Office-Supreme Court, U.S.
FILED
JUL 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD F. ZELEZNIK,

PETITIONER,

V.

COMMONWEALTH OF MASSACHUSETTS, ANGELINA SUPAN, SHIRLEY GALLUP, IRVING JACOBS, MARTA VILLACORTE AND ROBERT SHARON,

RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

Reply Brief to Brief for the Respondent in Opposition

Carter Zeleznik, *PRO SE*
338 Rosemary Avenue
Ambler, Pennsylvania, 19002

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are in answer to those suggested in the Brief for the Respondent in Opposition.

1. The refusal of the Massachusetts Courts to expand their definition of nuisance to include the circumstances of this case amounts to a substantial federal question.

2. The issue of the constitutionality of the doctrine of sovereign immunity is not moot.

3. The constitutionality of the retroactive application of the abrogation of the Commonwealth's immunity from tort suit so that it excludes causes of action arising before August 16, 1977 was not decided by the state courts and therefore must be reviewed by this honorable Court.

4. It was unconstitutional for the Massachusetts Legislature to abrogate sovereign immunity retroactively to August 16, 1977, the date when the Massachusetts Supreme Judicial Court announced that it would abolish immunity if the legislature failed to act.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980
No. 80-1914

CARTER ZELEZNIK, ADMINISTRATOR
OF THE ESTATE OF ARNOLD F. ZELEZNIK,
Petitioner

vs.

COMMONWEALTH OF MASSACHUSETTS
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF TO THE RESPONDENT'S
BRIEF IN OPPOSITION

The brief for the respondent raises new statements which merit reply.

The statement of the four questions presented by the respondent is comprehensive. However, the petitioner respectfully submits to the court that the very questions raised by the respondent are not answered in that brief and require rephrasing.

I. THE REFUSAL OF THE MASSACHUSETTS COURTS TO EXPAND THEIR DEFINITION OF NUISANCE TO INCLUDE THE CIRCUMSTANCES OF THIS CASE AMOUNTS TO A SUBSTANTIAL FEDERAL QUESTION.

First, it may be noted that Arnold Frank

Zeleznik's murder did not occur on November 27, 1974, as stated in the respondent's brief (p. 6). November 27, 1974 was the date of the negligent release of Vernal Walford from the Northampton State Hospital. Arnold was murdered three weeks later.

Second, in the respondent's brief, it is stated that "the Massachusetts Supreme Judicial Court On May 13, 1973, ruled that the Commonwealth would no longer be immune from suit for the creation or maintenance of a private nuisance and that the "decision left the Commonwealth's immunity otherwise intact..." (p. 6) Such was hardly the case as shown by the subsequent decision in Whitney v. Worcester (373 Mass. 208, 366 NE2d 1210 (1979)). In Whitney, that court cited its 1973 decision and used it as a precedent for granting further rights.

> While there was widespread and justifiable reliance on the immunity Doctrine prior to our decision in Morash, we think that subsequent to that opinion further reliance was misplaced. (Whitney, 225.) (Em-

phasis added.)

It is correct that the petitioner now argues this is a nuisance suit against the Commonwealth. This argument was made early in the course of the suit. Grounds for this suit, however, are not limited to nuisance just as it is improper to argue that the court's only real concern in Morash was with nuisance actions. It merely happened to have been presented there with a nuisance action. The fact that no Massachusetts court has ever affirmatively ruled on the implications of Morash with regard to the present case is irrelevant insofar as judicial silence should not be permitted to be used as a defense for evasion of the issues which have been raised. It is agreed that matters of state law do not fall within this Court's jurisdiction, except, as noted by the respondent, when there is a need to protect "the individual citizen from state action that is wholly arbitrary or irrational"; such is the situation in the present case. (p. 7)

II. THE ISSUE OF THE CONSTITUTIONALITY OF THE DOCTRINE OF SOVEREIGN IMMUNITY IS NOT MOOT.

The respondent asserts that "because immunity no longer exists, there is no occasion for this court to review its constitutionality." (p. 8) The issue is hardly moot: The doctrine of sovereign immunity is being called upon by the Commonwealth as its only defense in the present case (and this defense, as the respondent knows full well, may be called upon in other cases as well). It is indeed strange and highly inconsistent to be told that the very defense used by the Commonwealth of Massachusetts to protect itself with regard to its negligence in having caused the death of an innocent child "no longer exists". Such logic is self-serving and at best is an inequitable application of law. Further, although as the respondent notes (pp. 4,6), the Commonwealth has had a long history of applying the common law doctrine of sovereign immunity to protect itself from suit, the Commonwealth has failed to

defend the doctrine as good, just, reasonable, or necessary. The court has epitomized it in contrary terms. The doctrine has been called upon simply because it exists. The merits of the doctrine remain unknown to both petitioner and, it seems, to respondent. For the purposes of this case and others, it is still there.

If the President of the United States enjoys no absolute immunity in what can be alleged to be defense related actions, how can a state claim absolute immunity in its negligent operation of what is basically a proprietary activity? (Halperin v. Nixon, citation not available.)

If a convict in a state prison has a constitutional right to sue the state in its own courts for negligence for the loss of a $23.50 hobby kit, does an innocent child whose life was taken as a result of the gross and wanton negligence of a state and its employees warrant no protection whatsoever? (Parratt v. Taylor, 79-1734 (1981).

In the present case, unlike Parratt, there is a complete absence of tort remedies vis-a-vis the state as a means of redress for deprivation of life. In the present case, it was possible for the state to have instituted procedures to contain and direct the actions of its officials, but because of its immunity, it saw no need to do so. Deliberate and needless risks were taken by the individual defendants in their willful negligent discharge of Walford and in their failure to adhere to professional standards. Similar negligence is involved in the failure of the state to establish procedures to insure that such standards would be adhered to. Since the negligence was generated and fostered by the state's laxity in monitoring procedures and because this is related to its dependence on absolute immunity, "state action" and the actions of individual state employees become indistinguishable and inseparable.

The Holocaust has taught not only the Jewish people, but all people, that there

come times when one individual must stand up against what is patently wrong, whether the wrong is committed by another individual or by a corrupt governmental entity parading as unable to do wrong. The Commonwealth says that the doctrine of sovereign immunity is no more. The facts show that it is still here and until the Supreme Court of the United States unequivocally speaks against an absolute and blanket application of it, we may expect it to reappear in one form or another when it is expedient for this to happen.

Presently, Massachusetts is asking that it be excused from the consequences of its negligence "just one more time". No thinking person can believe that if it is granted that right, its desire to call upon it will be reduced and that when a suitable occasion arises and it is momentarily advantageous for it again to defeat its responsibility that it will not do so. The time is past due for governmental entities to be denied the absolute right to be wrong. Honest mistakes can

be tolerated. Mistakes born of gross and wanton negligence and in the knowledge that no one will be held accountable cannot be so condoned and should lead to imposition of penalties, even against the state.

III. THE CONSTITUTIONALITY OF THE RETROACTIVE APPLICATION OF THE ABROGATION OF THE COMMONWEALTH'S IMMUNITY FROM TORT SUIT SO THAT IT EXCLUDES CAUSES OF ACTION ARISING BEFORE AUGUST 16, 1977 WAS NOT DECIDED BY THE STATE COURTS AND THEREFORE MUST BE REVIEWED BY THIS HONORABLE COURT.

The third reason presented by the respondent for rejection of the petition for certiorari is similarly disturbing. The respondent argues that the constitutionality of the failure of the state legislature to provide rights to similarly situated litigants to those in the Whitney case was not decided by the state courts and therefore should not be reviewed by this Court. Again, this is the argument based on judicial silence. The reason that there was no judicial decision in this regard was because of the failure of the state courts to make one, not for want of opportunity to do so. In fact, in

its order dismissing the petitioner's appeal dated October 22, 1980, the Appeals Court even insinuated that the present suit was frivolous through its reference to Carilli v. Hersey. (Appendix to original brief, p. 3a) It thus suggested that the constitutional issues which had been raised were not worthy of attention. The Supreme Judicial Court concurred in this in its rejection of the case.

While acknowledging that these federal issues were never decided by the state courts, the respondent claims that the "petitioner has failed to designate in what manner and when" they were raised (p. 9). This allegation is made in spite of the fact that the constitutional issues were infact brought up repeatedly by the petitioner through the history of this suit, as even a cursory inspection of earlier briefs prepared by the petitioner will show. The Order of the Massachusetts Appeals Court dismissing this case did assert that no constitutional question had been presented for review. This assertion was

based upon a Superior Court Report (Appendix to original brief, pp. 9a-11a). That report was written prior to Whitney and prior to the Tort Claims Act of 1978, both of which, of course, compounded the constitutional issues involved. The erroneous nature of the Appeals Court's interpretation of that report was brought to the attention of Judge Hale of the Appeals Court in a letter dated July 9, 1979. (Present appendix, pp. 1a-6a). The letter makes it very clear that the constitutional issue had been raised on pp. 5-6 of the Plaintiff's Memorandum filed June 21, 1977. As it became manifest that the doctrine of sovereign immunity would be invoked by the Commonwealth following and in spite of Whitney, the constitutional issues were raised repeatedly, virtually ad nauseam.

If constitutional issues are properly raised, as in this case, and if the courts of a state choose not to respond to them, the federal court is the proper forum to raise them again.

The fact that the claims against individual defendants remain outstanding is irrelevant with regard to the claims against the Commonwealth. It is important to note that each of these individuals has also attempted to cloak himself or herself with the doctrine of sovereign immunity, each having made a motion for a summary judgment on that basis. (See original appendix, p. 11a) Although each of the individuals named can be shown to have acted negligently, the greater negligence was that of the Commonwealth for not having insured against their negligence, if, in fact, it did not tacitly encourage such negligence. It is clear that if the Commonwealth can avoid liability for its negligence on the basis of an archaic doctrine, each of these individuals would be justified in similarly calling upon that doctrine. Resolution of this issue is essential to overall resolution of this case.

IV. IT WAS UNCONSTITUTIONAL FOR THE MASSACHUSETTS LEGISLATURE TO ABROGATE SOVEREIGN IMMUNITY RETROACTIVELY TO AUGUST 16, 1977, THE DATE WHEN THE

MASSACHUSETTS SUPREME JUDICIAL COURT ANNOUNCED THAT IT WOULD ABOLISH IMMUNITY IF THE LEGISLATURE FAILED TO ACT.

Finally, the respondent claims that it was constitutional for the legislature to abrogate sovereign immunity retroactive only to the date of the Whitney decision. The respondent implies that the court intended August 16, 1977 as the effective date for the abrogation of the doctrine. Such, of course, is not the case. The court clearly stated that in order to avoid "constitutional infirmities" the effective date of abrogation should have been May 13, 1973. (Whitney, 210)

> Nor do we have any wish to promote unnecessary possibilities of unequal treatment among litigants, as caused by the chance of dates of injuries or lawsuits, as related to the sequence of judicial and legislative actions. (Op. cit. 211)

The respondent asserts that it is "within the inherent power of the highest court of a state to give a decision prospective or retrospective application without offending constitutional principles." (p. 11) The court, no doubt relying on the principles articulated

in Desist v. U.S., 394 U.S. (821-858) in its own words chose the retrospective approach for constitutional reasons.

> We think that sufficient evolution has occurred in the law of governmental liability, in the imposition of liability in previous cases, in the warnings we have given regarding our intent to abolish the doctrine of governmental liability and in the voluntary assumption of liability under enabling statutes, that we need not confine the rules forecast in this case to solely prospective operation. (Whitney, at 225)

The respondent further states that failure to provide retroactivity "in the law did not deprive the petitioner of some benefit to which he was formerly entitled..." (p. 12) The reasoning of the respondent is once again self-serving. It is clear that had the Tort Claims Act not been enacted, the petitioner would have been allowed to sue the Commonwealth.

> Similar cases involving other litigants, including cases asserting liability against the Commonwealth or any political subdivision of the Commonwealth, shall be entitled to similar treatment, on motion of any party. (Whitney, 226)

Unquestionably, on the basis of the Whitney decision, rights were established. Be-

cause of the failure of the Tort Claims Act to provide relief to the time specified by the Supreme Judicial Court, petitioner was deprived of those rights.

The respondent states that to have made the Tort Claims Act retroactive to the date selected by the Supreme Judicial Court "would create chaos". (p. 13) Of course, this is an exaggeration. Such retroactivity would have required the courts to have defined which litigants were similarly situated and which were not, but this is hardly chaos. The Supreme Judicial Court addressed this matter in Whitney (225) and provided both guidelines and justification for their application. The Court foresaw no intolerable administrative or financial burden on the Commonwealth or other governmental units in the state.

> The fiscal consequences of retroactivity are potentially immense, as such a ruling would expose governmental entities to liability in tort for all causes of action on which the statute of limitations had not yet run. However, we think that the modified retroactivity forecast here would not have disastrous fiscal conse-

> quences. Our proposed action will not subject governmental entities to liability for all pecuniary injury. Further, we take notice that municipalities customarily, although perhaps not invariably, indemnify employees for their tort liability on a voluntary basis. (Whitney, 225-226)

The respondent suggests that prior to Whitney, no one was "entitled to rely on an expectation that the immunity would be abrogated." (p. 13) To the contrary, as noted above, the words and actions of the court in both Whitney and Morash refute this notion.

The respondent further argues that since "recovery of damages in tort does not impinge on a constitutionally protected substantive right and is not predicated on a suspect classification, any classification created thereby is valid unless it rests on grounds wholly irrelevant to the achievement of any legitimate objective." (p. 14) As demonstrated at great length in the original petition, that is indeed the situation in this case.

As noted in the original petition, the petitioner does not claim a constitutionally

protected substantive right to recovery of damages in tort, but argues that insofar as both common law and statutory rights to recovery do exist in Massachusetts, and because the system of classification which has been used to deprive him of such rights is irrational, arbitrary, and is wholly irrelevant to the achievement of any legitimate governmental objective, his constitutional rights are, in fact, being violated. The case cited by the respondent is appropriate here:

> It is the inescapable responsibility of the judiciary, state and federal, to determine whether or not legislation transgresses the constitutional limits on legislation and to interpret legislation. McRae v. Mathews, 421 F. Supp. 533 (1976)

However, as stated in the original petition (pp. 63-64), this case is not predicated only or primarily on a monetary award, although a significant monetary award would have a chilling effect upon the continued willingness of the Commonwealth to condone negligence in the operation of its facilities.

More importantly, this case is concerned

with publicly exposing the gross and wanton negligence of professional employees at the Northampton State Hospital. It is concerned that repetition of such negligence be prevented. It is concerned with a principle, a principle sacred to our pride as a people, and essential to our survival as a nation, that to harm any individual thereby harms all individuals and that we have a collective responsibility to protect one another. That the Commonwealth is so ready to sacrifice this principle in this case casts doubt upon its commitment to the principle in other contexts. The purpose of litigation in this case is, therefore, clearly not primarily that of pecuniary gain at Arnold Frank Zeleznik's expense. Human life can never be replaced with dollars no matter how many.

CONCLUSION

The respondent's brief, unresponsive to the merits of this case, depends upon a defense which was discredited by the highest court of the Commonwealth of Massachusetts.

That defense has kept the truth concerning the negligence of the Commonwealth in this case from being aired.

The respondent's brief also suggests that the Commonwealth continues to fail to take this case seriously, just as it failed to take seriously its responsibilities in providing care to the man who murdered Arnold Frank Zeleznik and as it failed to establish or maintain standards of care in general in the Northampton State Hospital. Then and now, it has relied upon its ability to invoke the doctrine of sovereign immunity knowing that through that doctrine, no examination of specific events and circumstances could ever occur.

Moreover, even at this point, the Commonwealth can depend upon the fact that there is such a low probability that any case taken to the United States Supreme Court will be accepted for review because of the heavy caseload which confronts the Court. Why should the Commonwealth therefore be concerned about the

arguments it employs?

However, this case demonstrates how an innocent child may be deprived of his life as a consequence of the negligence of a governmental entity which pretends that it can do no wrong. It thus provides a measure of and a test of our legal and social system and of our commitment to the dignity and worth of each human life. If it is not the responsibility of government to protect the lives of individuals, is it then for government to act so that such individuals are unnecessarily deprived of their lives? Arnold's most precious words, written shortly before his death were, "With God, we can." And we can.

For these reasons and for the reasons previously stated in the petition presented to this Court, the petitioner asks that relief be granted and that he be allowed to litigate his claim against the Commonwealth of Massachusetts.

Respectfully submitted,

Carter Zeleznik
338 Rosemary Avenue
Ambler, Pennsylvania, 19002

Carter Zeleznik
PRO SE

(Date) July 2, 1981

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Letter to Honorable Allan M. Hale, Chief Justice, Appeals Court 1a-6a

HALE AND DORR
Counsellors at Law
60 State Street
Boston, Massachusetts
02109

July 9, 1979

Honorable Allan M. Hale
Chief Justice
Appeals Court
1500 New Court House
Boston, Massachusetts 02108

Re: Carter Zeleznik, Administrator v. Commonwealth et al, No. 77-705

Dear Mr. Chief Justice:

Pursuant to Appellate Rule 27, the plaintiff-appellee respectfully petitions for rehearing and requests that the Court's Order of June 28, 1979, be revised so as to avoid unnecessary prejudice to the plaintiff's right to present issues for review.

The Report states that the matters before the trial judge were the defendants' motions for summary judgment. Each of the motions was based upon the asserted failure of the complaint to state a claim upon which relief can be granted, specifically, upon the defense of sovereign immunity. According to the Report, the trial

judge denied these motions.

By the terms of the Commonwealth's own motion, the trial judge's ruling would be correct if the complaint states a claim upon which relief can be granted. With respect to the defense of sovereign immunity raised in that motion, the ruling would be correct if (a) sovereign immunity is inapplicable (i.e., because the complaint alleges an actionable nuisance), or if (b) sovereign immunity is unconstitutional.

The plaintiff assumed that this court would answer the question posed in the Report in the context of the issues raised by the Commonwealth's moition and in light of whatever legal ground would support the action of the trial judge in denying that motion. Thus, a determination that sovereign immunity is unconstitutional would require its judicial abrogation and an affirmative answer to the question posed. On the other hand, a determination that sovereign immunity is inapplicable because of

the nuisance exception to the doctrine would require a negative answer to the question posed. But, in either event, the action of the trial judge would be sustained. The action of the trial judge would be reversed only if there were no legal grounds to support it. It is respectfully submitted that this is the context and manner in which the question was reported.

The plaintiff respectfully calls to the Court's attention that the constitutional issue was specifically argued below in opposition to the Commonwealth's motion (Plaintiff's Memorandum, pp. 5-6, filed on June 21, 1977). Further the sovereign immunity decision next following the Morash decision, Whitney v. City of Worcester, 1977 Mass. Adv. Sh. 1713, referred to the constitutional issue in the context of whether sovereign immunity should be abrogated. Id. at 1715-1716. Would not a fair reading of the question posed in the Report include the Whitney decision within the ambit of the Report's phrase, "In light of

decisions of the Supreme Judicial Court, such as ...."? Whether sovereign immunity is abrogated because of a principle of public policy or because of some constitutional principle, the question posed is whether it should be abrogated, however done. These are not separate questions, but two prongs of the same question.

The Court stated that no constitutional issue was presented in the Report, and declined to consider that issue or the nuisance issue. Yet, by directing entry of a final judgment for the Commonwealth, the Court in effect decided these issues against the plaintiff. As a result, the plaintiff fears that he may now have no effective right of appeal from that judgment, and may be summarily deprived of any opportunity to be heard on the constitutional or nuisance issues. The plaintiff respectfully submits that it would be a manifest innustice to turn the plaintiff out of court without a determination of the important issues raised by the Commonwealth's motion.

The plaintiff does not believe that the Court intended by its Order to forever deprive the plaintiff of an opportunity to be heard on these issues. However, the plaintiff is concerned that the wording of the Order seriously prejudices the plaintiff's rights in this regard. If the Court perceives any ambiguity in the Report, it can be clarified if necessary by the trial judge. Certainly his action in framing the Report should not be construed as intending to prevent the plaintiff from being heard on these substantive issues.

For these reasons, the plaintiff respectfully requests, that in lieu of a reversal and final judgment, the Report be discharged and that the matter be permitted to stand for further action by the trial judge. In the alternative, the plaintiff requests that the second paragraph of the Court's Order be revised so that the final judgment is without prejudice to the plaintiff's right to present the constitutional and nuisance issues on appeal from such judgment.

The plaintiff appreciates this opportunity to bring to the Court's attention the substantial reasons for revision of the Court's Order. The plaintiff trusts that the Court understands the plaintiff's concern that he receive a full and fair hearing in view of the serious issues raised by the wrongful death of Arnold Zeleznik.

Respectfully submitted,

CARTER ZELEZNIK, ADMINISTRATOR,
By His Attorneys,

s/ Evan Y. Semerjian
Richard J. Innis

EYS:slm

cc: W. Channing Beucler, Esq.